MISTAKE OF FACT AS A GROUND FOR AFFIRMATIVE EQUITABLE RELIEF.

EQUITY, in a proper case, will relieve from mistake. Mistake may be a ground for affirmative relief.[1] It may be a defense to specific performance.[2] As a ground for affirmative relief, mistake is often placed in the same category with accident and fraud. All three have the common characteristic that each, when established in the legal sense, creates an inequality between the parties which will move the discretion of the Chancellor to action. Moreover, there is no bright line which divides mistake from either fraud or accident. Yet mistake is distinguishable from both. Accident creates a change in the actual situation of the parties — as destruction of the subject matter of a bargain by the act of God. It contains no mental element. Mistake, on the other hand, leaves the actual facts untouched. It involves affirmative action by the human mind. It consists in forming an incorrect mental picture of the situation. If this incorrect mental picture is caused by the unlawful representations or unlawful silence of another human being, the case passes from the realm of mistake into the realm of fraud. The presence of the mental ingredient, then, is the striking difference between accident and mistake. Fraud, on the other hand, consists of mistake plus a further element, the unlawful causing of the error by some person different from the person who labors under the mistake. Broadly speaking, then, if the error is the work of the party who labors thereunder the case is one of mistake. But, if the incorrect mental picture be due to the unlawful silence or the unlawful representations of some third party, this further element of third party causation makes the case one of fraud. For this reason equity is slower to relieve from mistake than from fraud. The fact that the party who sets up the mistake is the party responsible therefor makes it necessary for him to show special and peculiar grounds for relief.

Mistake of law is to be distinguished from mistake of fact. A mistake of law arises when a party is accurately informed, either

[1] 16 Cyc. 68, note 1.

[2] See Fry, Specific Performance, 4 ed., p. 329, and p. 522 *et seq.*

actually or constructively, of the facts, but reaches an erroneous conclusion with respect to the legal rights growing out of those facts. A mistake of fact arises when a party forms a conception of the facts which differs from the facts as they really exist. The principle is clear enough, but the application to given cases is a matter of great nicety which is beyond the scope of this article. Here it is enough to say that, while the general rule is that equity will not relieve from a mistake of law,[1] such relief has been given,[2] and some courts have been very ingenious in discovering exceptions to the rule itself.[3]

Mistake of fact, then, is a ground for affirmative equitable relief.[4] But equity will not relieve from every species of mistake of fact. The mistake must be appropriate to the relief sought, and must bear the right relation to the parties and to the subject matter. Mistake of fact, must, therefore, be classified with respect to the relief at the Chancellor's disposal, with respect to the parties, and with respect to the subject matter.

Naturally, the relief, if relief be given, must reach the mistake. But the rule works both ways. Where particular relief is sought, the mistake must justify that relief.[5] Analysis of the relief which may be given is, therefore, a partial analysis of the kind of mistake which is ground for relief. Broadly speaking, the Chancellor has at command two kinds of affirmative relief. He may rescind the bargain or transaction, or he may reform the writing in which the bargain or transaction is intended to be expressed, provided that there is such a writing. The word "rescind" is here used in the broad sense, and includes cancellation and surrender up.[6] The statement of the two broad species of relief brings out one striking and basic difference between them. Rescission deals with the subject matter of the bargain or transaction: reformation deals with writings only. But a bargain is born of a meeting of minds upon the subject matter thereof. To be ground for rescission, the mistake must touch the subject matter of the bargain.[7] If it be collateral to the bargain, no rescission can be given.[8] On the other hand, reformation leaves the bargain un-

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[1] 16 Cyc. p. 73, note 36.

[2] Griswold *v.* Hazard, 141 U. S. 260. See 16 Cyc. p. 73, note 37.

[3] 16 Cyc. p. 74.

[4] 16 Cyc. p. 68, note 1.

[5] Truesdell *v.* Sarles, 104 N. Y. 164.

[6] 6 Cyc. p. 285.

[7] Hurd *v.* Hall, 12 Wis. 112; Strickland *v.* Turner, 7 Exch. 208.

[8] Hecht *v.* Batcheller, 147 Mass. 335; McCobb *v.* Richardson, 24 Me. 82; Wood *v.* Boynton, 64 Wis. 265; Stewart *v.* National Bank, 104 Me. 578.

touched. To be ground for reformation, the mistake must intervene between the creation of the bargain and the reduction of it to writing, and must touch the writing only.[1] If the writing be exactly what the parties intended, there can be no reformation.[2] It follows, then, that one who seeks rescission must establish a mistake of the proper character which touches that on which the minds of the parties met; if he seeks reformation, he must establish a mistake in respect of the writing only.

Another principle in regard to reformation brings out this distinction very clearly. To obtain reformation, the plaintiff must establish some standard to which the writing may be reformed. But, when the writing is intended to express a transaction founded on valuable consideration, nothing less than a valid and enforceable bargain will serve as a standard.[3] Equity cannot make a contract for the parties. True, the Chancellor may cast into prison the body of one in contempt. Once he was supposed to have power to damn the soul of a disobedient defendant. But he never has claimed jurisdiction over the human mind. A valid bargain is born of a meeting of minds. If the minds of the parties never met, there is no bargain to which the writing can be reformed.[4] Reformation, then, is an affirmance of the bargain as it was actually made.[5] Rescission, on the other hand, is a disaffirmance of the bargain itself. It is the antithesis of reformation. Consequently, a mistake which is ground for reformation will not justify rescission in any ordinary case; while a mistake which is ground for rescission will not justify reformation, since it strikes at the bargain which must serve as the standard for reformation.[6]

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[1] Page *v.* Higgins, 150 Mass. 27; Ledyard *v.* Hartford Ins. Co., 24 Wis. 496.

[2] Andrew *v.* Spurr, 8 Allen (Mass.) 412; Whittemore *v.* Farrington, 76 N. Y. 452; Braun *v.* Wis. Rendering Co., 92 Wis. 245; Auer *v.* Mathews, 129 Wis. 143.

[3] Gun *v.* McCarthy, L. R. Ir. 13 Ch. D. 304; Petesch *v.* Hambach, 48 Wis. 443; Moehlenpah *v.* Mayhew, 138 Wis. 561; Glass *v.* Hulbert, 102 Mass. 24; Peirce *v.* Colcord, 113 Mass. 372; United States *v.* Milliken Co., 202 U. S. 168; Fulton *v.* Colwell, 112 Fed. 831.

[4] Page *v.* Higgins, 150 Mass. 27; Gun *v.* McCarthy, L. R. Ir. 13 Ch. D. 304; Ledyard *v.* Hartford Ins. Co., 24 Wis. 496. *Cf.* Raffles *v.* Wichelhaus, 2 Hurl. & Colt. 906; Ionides *v.* Pacific, etc. Ins. Co., L. R. 6 Q. B. 674; Hickman *v.* Bereus, 1895, 2 Ch. 638.

[5] Pfeiffer *v.* Marshall, 136 Wis. 51. But some courts permit a bill which seeks reformation, or, in the alternative, cancellation. Gun *v.* McCarthy, L. R. Ir., 13 Ch. D. 304. Though it has been held improper to reform an absolute deed into a mortgage, where the relief sought by the bill was rescission. Truesdell *v.* Sarles, 104 N. Y. 164.

[6] Laver *v.* Dennett, 109 U. S. 90; R. R. Co. *v.* Steinfeldt, 42 Oh. St. 449; Trues-

Mistake, when classified with respect to the parties thereto, is either unilateral or mutual. A unilateral error is confined to one party only. A mutual mistake is a mistake common to both parties. But two different mistakes with respect to the same bargain do not make a mutual mistake. The same error must be shared by both parties in order to render the error mutual. In this respect mutual error resembles mutual assent. Unless the minds of the parties meet on the subject matter of the bargain, there is no mutual assent thereto.[1] Unless the minds of the parties fall into the same misconception with respect to that bargain, there is no mutual error.[1] At best, there is simply a pair of unilateral mistakes.[1]

Perhaps two illustrative cases will make this point clear. In Page *v.* Higgins,[2] the plaintiff agreed to buy of the defendant "all the land owned by the defendant east of the stone wall." The plaintiff understood this to include the Cheever lot, the defendant understood this to omit the Cheever lot, which he did not own. The plaintiff drew the deed, describing the land conveyed by metes and bounds, and in good faith included the Cheever lot therein. The defendant failed to discover that the Cheever lot was included. This action was brought on the covenant of seisin in the deed. The defendant (by statute) set up what in effect amounted to a claim for reformation. *Held*, that a judgment for defendant must be reversed, since the evidence shows two different mistakes, and not a common or mutual mistake — the error of the plaintiff being as to the meaning of the original agreement, the error of the defendant being as to the contents of the deed. In Ledyard *v.* Hartford, etc. Ins. Co.[3] the plaintiff requested insurance upon certain furniture in building number 1; the insurance agent understood that the furniture was in building number 2, and so drew the policy. Building number 1 burned with the furniture. Plaintiff seeks reformation of the policy, so that it should describe the furniture as in building number 1. *Held*, that, since the evidence shows two unilateral mistakes as to the bargain, and no

dell *v.* Sarles, 104 N. Y. 164. But see Abbott *v.* Dow, 133 Wis. 535. Here the minds of the parties met on an agreement to purchase lot 1; by mutual mistake, the writing described lot 2. Before the mistake was discovered, the defendant conveyed lot 1 to a purchaser for value and without notice. On discovery of the mistake, the plaintiff sought rescission and recovery of moneys already paid down. *Held*, that, while the usual relief would be reformation, rescission will be here granted in view of the inability of the defendant to perform the original agreement because of his innocent conveyance of lot 1.

[1] See *supra*, note 4. [2] 150 Mass. 27. [3] 24 Wis. 496.

mutual mistake as to the writing, reformation cannot be given. These cases, then, show that, where each party labors under a different mistake, the two different mistakes cannot be combined to make a mutual or common mistake.

A mistake by one party, coupled with ignorance thereof by the other party, does not constitute a mutual mistake.[1] Thus, if the minds of the parties meet on the subject matter of the bargain, but one party enters into the bargain under a mistake, and the other party enters into the bargain in ignorance of the mistake, or in the belief that no mistake has been made, there is no mutual error. Two recent cases illustrate this very nicely. In Steinmeyer *v.* Schroeppel,[2] the defendant requested a bid from the plaintiff upon certain items of lumber. The plaintiff's clerk set down these items on a piece of paper, with the price of each item marked against it. The plaintiff's partner added the items incorrectly. The plaintiff adopted the erroneous total and made a written offer to supply the lumber for that sum, which was some four hundred dollars short of the correct total. This offer the defendant accepted in good faith. On discovery of the mistake, the plaintiff brought a bill in equity to rescind the contract. The court below granted this relief. The Supreme Court of Illinois reversed the judgment upon the ground that the mistake was not mutual. Another case, very like the last, is Grant Marble Co. *v.* Abbot.[3] In this case, the plaintiff made a written offer to install marble in all six stories of the defendant's building for $24,150. In making this offer, the president of the plaintiff company used certain figures furnished by a subordinate, supposing that they covered the work in all six stories. In truth, they only covered five stories. The defendant accepted the offer in ignorance of the mistake. On discovery of the mistake, the plaintiff sought relief in equity, and the court below rescinded the bargain. The Supreme Court of Wisconsin held that the mistake was not mutual and reversed the judg-

[1] Moffett, etc. Co. *v.* Rochester, 91 Fed. 28 (reversed on another ground in 178 U. S. 373); Dewey *v.* Whitney, 93 Fed. 533; Comer *v.* Granniss, 75 Ga. 277; Griffin *v.* O'Neil, 48 Kan. 117; Steinmeyer *v.* Schroeppel, 226 Ill. 9; McCormack *v.* Lynch, 69 Mo. App. 524; Benn *v.* Pritchett, 163 Mo. 560; Wilson *v.* Western Land Co., 77 N. C. 445; Brown *v.* Levy, 29 Tex. Civ. App. 389; Coates *v.* Buck, 93 Wis. 128; Grant Marble Co. *v.* Abbot, 124 N. W. 264 (Wis., 1910). Another familiar instance of the same principle is the case where a surety is induced to make the contract by the fraud of the principal debtor, but the fraud is unknown to the creditor. See *post*, p. 624, note 3.

[2] 226 Ill. 9.

[3] 124 N. W. 264 (Wis., 1910).

ment. These cases, then, emphasize the principle that a mistake is not mutual, unless both parties labor under the same misconception. A mistake by one party, and a belief by the other party, that there has been no mistake, make a pair of different mistakes and not a mutual error.

A mistake, when classified with respect to the subject matter of the contract, is either intrinsic or extrinsic. An intrinsic mistake is defined by Mr. Justice McLean in Allen *v.* Hammond [1] as a "material mistake as to the subject matter of the bargain." Story, J., in Hammond *v.* Allen [2] (the same case in the court below) defines it as "a mistake of fact going to the essence of the contract." In Kowalke *v.* The Milwaukee, etc. Co.,[3] Mr. Justice Dodge says that an intrinsic mistake is a mistake as to "one of the things actually contracted about." An intrinsic mistake, then, is an error with respect to some matter which the parties have made a condition of the bargain. But this does not mean that the condition must of necessity be expressed in words. The acts of the parties and the expressed terms of the bargain may define the condition with sufficient clearness to render an error with regard to it intrinsic. The stock judicial example of such a clearly defined, but seldom expressed, condition is the assumption, by the parties, of the continued existence of the subject matter of the contract. When A and B agree upon the sale of a given horse, they seldom, if ever, say in words: "If this horse is dead, the bargain is off." Yet this is as clearly understood as if expressed. The making of the agreement is, in effect, a statement of this condition. If, at the time the parties made the bargain, the horse was dead, we have a clear example of an intrinsic error.

An extrinsic error, on the other hand, is an error in respect of some matter collateral to the bargain. It may affect the reasons for entering into the contract, or touch some matter of inducement, but it leaves untouched the subject matter or essence of the agreement itself. Thus mistakes as to value or quality are classed as extrinsic mistakes, because they touch neither the existence nor identity of the thing sold, nor the basis of the bargain. Frequently, the parties, if they knew the truth, would not make the agreement which they did make. But this is not the test. The test seems to be, does the mistake affect the basis or understanding on which the parties contracted?

[1] 11 Pet. (U. S.) 63, 70.
[2] 2 Sumn. (U. S.) 387, 395.
[3] 103 Wis. 472, 477.

If it does, the mistake is intrinsic; if it does not, the mistake is extrinsic. Of course the distinction between intrinsic and extrinsic mistakes is one of great nicety. But it is essentially a question of fact under all the circumstances of the case. It is not surprising, therefore, that, in particular instances, we may find cases on quite similar facts, which have been decided in opposite ways. As we shall see later, an intrinsic mistake is ground for equitable relief,[1] while an extrinsic mistake is not.[2] The burden of showing that the mistake is intrinsic is upon the party who sets it up. He may succeed in one case and not in the other. Perhaps this goes far to explain the somewhat contradictory decisions on the subject.

Certain classes of mistake are clearly intrinsic. A mistake in regard to the identity of the thing contracted for is obviously of the essence. Thus, in Raffles *v.* Wichelhaus,[3] the plaintiff and defendant agreed that the defendant should buy at a certain price one hundred and twenty-five bales of Surat cotton "ex Peerless" from Bombay. There were two ships called the Peerless which sailed from Bombay, and it subsequently appeared that the plaintiff meant the one and the defendant the other. *Held*, an intrinsic mistake which prevented the formation of any contract. It may be noted that the error in Page *v.* Higgins, *supra*, and Ledyard *v.* Hartford Ins. Co., *supra*, was of similar nature. The parties were not at one as to the subject matter of the bargain. In the same way, if the parties to a sale are not at one as to the identity of the vendee, there is an intrinsic mistake which goes to the validity of the sale.[4] Thus, in Rodliff *v.* Dallinger,[5] one who represented himself as the agent of an undisclosed principal induced the plaintiff to deliver to him goods with intent to pass title thereto to the principal. There was in truth no principal. *Held*, that no title passed. A mistake, then, as to the identity of the subject matter or as to the identity of the parties (if that identity be material) [6] is clearly intrinsic. Also it is usually fatal to the legal validity of the transaction.

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[1] See *post*, p. 615, notes 2–5 inclusive. [2] See *post*, p. 616, notes 1–5 *et seq.*

[3] 2 Hurl. & Colt. 906.

[4] Cundy *v.* Lindsay, 3 A. C. 459; Boulton *v.* Jones, 2 H. & N. 564. Boston Ice Co. *v.* Potter, 123 Mass. 28.

[5] 141 Mass. 1; Smith Co. *v.* Stidger, 18 Col. App. 261; Rogers *v.* Dutton, 182 Mass. 187; Hamet *v.* Letcher, 37 Oh. St. 356, *acc.* But a party may be estopped to set up his error. Stoddard *v.* Ham, 129 Mass. 383; Dowagiac Mfg. Co. *v.* Schroeder, 108 Wis. 109; Bostwick *v.* Mutual Life Ins. Co., 116 Wis. 392.

[6] See Smith *v.* Wheatcroft, L. R. 9 Ch. D. 223, 230.

While an intrinsic mistake may prevent the formation of the bargain, it need not necessarily do so. The parties may come together both upon the subject matter and the terms of the contract, and yet labor under a mistake which touches the essence. Thus the existence of the subject matter of the agreement is a clearly understood but seldom expressed condition of the transaction.[1] Where the parties bought and sold a cargo at sea, in ignorance of its loss, the error was held to be of the essence and ground for relief.[2] In the same way, if an insurance policy be taken [3] or assigned [4] in ignorance of the death of the insured, the mistake is intrinsic, since the parties contract upon the basis of his continued existence. Similarly, if the parties contract upon a particular understanding with respect to a given fact, there is an intrinsic mistake if the fact be different from the understanding of the parties.[5] Thus, in Hammond *v.* Allen,[6] the plaintiff gave the defendant an irrevocable power of attorney to collect a certain claim against the Portuguese government, the defendant to receive nearly one-third of the claim by way of compensation. At the time of this arrangement both parties were ignorant that the claim had already been allowed by the Portuguese government. *Held*, that the mistake is intrinsic, and ground for rescission. In Hitchcock *v.* Giddings,[7] the plaintiff bought of the defendant the defendant's interest in a certain remainder in fee after an estate tail, both parties understanding that the tenant in tail had not suffered a recovery. In truth, the tenant in tail had suffered a recovery. *Held*, that, since the parties contracted upon the basis that no recovery had been suffered, there is an intrinsic mistake which is ground for rescission. In all these cases, the court came to the conclusion that the parties came to a definite understanding with

[1] Lord Clifford *v.* Watts, L. R. 5 C. P. 577; Coturier *v.* Hastie, 5 H. L. Cas. 673; U. S. *v.* Charles, 74 Fed. 42; Scruggs *v.* Driver, 31 Ala. 274; Gibson *v.* Pelkie, 37 Mich. 380; Fritzler *v.* Robinson, 70 Ia. 500; Gribben *v.* Atkinson, 64 Mich. 651; Blake *v.* Lobbs Estate, 110 Mich. 608; Ridgley *v.* Conewago Iron Co., 53 Fed. 988; Cook *v.* Andrews, 36 Oh. St. 178; Buchanan *v.* Layne, 95 Mo. App. 148; Muhlenberg *v.* Henning, 116 Pa. 138. See also Howell *v.* Coupland, L. R. 1 Q. B. D. 258; Thompson *v.* Gould, 20 Pick. (Mass.) 134.

[2] Hastie *v.* Coturier, 9 Exch. 102.

[3] Pritchard *v.* Merchants', etc. Assoc., 3 C. B. N. S. 622.

[4] Strickland *v.* Turner, 7 Exch. 208; Scott *v.* Coulson, (1903), 2 Ch. 249.

[5] Fleetwood *v.* Brown, 109 Ind. 567; Sherwood *v.* Walker, 66 Mich. 568. But a change in the circumstances may be fatal to relief. Okill *v.* Whittaker, 2 Phillips 338.

[6] 2 Sumn. (U. S.) 387, affirmed in 11 Pet. (U. S.) 63.

[7] 4 Price 135.

respect to the fact as to which they were both in error. It was the existence of this understanding which rendered the mistake intrinsic rather than extrinsic. Of course the condition was not always expressed in so many words. This the court seems to have deemed unnecessary. It seems to have been sufficient that the understanding actually existed. Perhaps the court went a good way in finding a conscious understanding. But this is a question of fact into which it is impossible to enter effectively in the absence of the witnesses and the evidence.

Where the mutual error touches some collateral matter of belief or inducement, as to which there is no understanding, it is extrinsic, and no ground for relief. The difference seems to be one of degree. Have we a belief only, or an understanding? That seems to be the test. Thus questions of value or quality are usually deemed extrinsic.[1] In Wood *v.* Boynton,[2] the parties bought and sold for one dollar a certain stone in the mutual and erroneous belief that it was a topaz. In truth, it was a diamond worth seven hundred dollars. *Held*, an extrinsic error which will not justify a rescission. A case very close to this, but which was decided the other way, is Chapman *v.* Cole.[3] There the plaintiff, being possessed of a gold coin, privately issued in California by one Moffat (and so not legal money), passed it away to B, who passed it to defendant, all parties mistaking it for a fifty-cent piece. *Held*, that the plaintiff may maintain trover for the coin, since, by reason of the error, no title passed to defendant. Again, several cases have held that, where A sells to B (without indorsement) the promissory note of C, both parties being ignorant that C is insolvent, the error is collateral, and no ground for relief.[4] In the same way, where A sold B distant lands under the mutual but erroneous belief that there was valuable timber thereon, the mistake was held incidental to the bargain and insufficient to justify rescission.[5]

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[1] See Hecht *v.* Batcheller, 147 Mass. 335; Sankey *v.* First Nat. Bank, 78 Pa. 48.

[2] 64 Wis. 265.

[3] 12 Gray (Mass.) 141.

[4] Hecht *v.* Batcheller, 147 Mass. 335; Day *v.* Kinney, 131 Mass. 37; Bicknall *v.* Waterman, 5 R. I. 43; Burgess *v.* Chapin, 5 R. I. 225. *Contra*, Harris *v.* Hanover Bank, 15 Fed. 786. But, if the note had been invalid, the error would have been intrinsic. Hurd *v.* Hall, 12 Wis. 112; Lawton *v.* Howe, 14 Wis. 241; Maldaner *v.* Beurhaus, 108 Wis. 25. See also Gordon *v.* Irvine, 105 Ga. 144; Brown *v.* Montgomery, 20 N. Y. 287.

[5] McCobb *v.* Richardson, 24 Me. 82. But *cf.* Thwing *v.* Hall & Ducey, etc. Co., 40 Minn. 184.

Similarly, where the parties sold and purchased government bonds in ignorance that, by reason of extension of the time of maturity, they commanded a premium, the error was held to be collateral.[1] And where the parties arranged for a water supply from a particular source in ignorance that it would prove insufficient, the mistake was held extrinsic.[2] Again, where the parties bought and sold an incumbrance in the mutual and erroneous belief that it was a first incumbrance, whereas it was really a second incumbrance, the error was held collateral.[3] And where one partner buys out another partner's share, a mistake as to the value of the share was deemed not intrinsic.[4] In all these cases there was a mutual mistake. But the mutual error did not become the basis of the bargain actually made. It touched a reason for the contract, but was not a condition of it. Hence it was no ground for relief.

Mistake, then, has been classified with respect to the relief, with respect to the parties, and with respect to the subject matter. Mistake of the proper character is ground for rescission or for reformation, according to its nature. The two final questions, therefore, are, with respect to the kind of mistake which must be established as a basis for each kind of relief.

Reformation, as has been already shown, deals with the correction of writings. It leaves untouched the substance of the transaction. Indeed, the scope and purpose of it is to make the erroneous writing express the transaction correctly. Usually the transaction is a bargain founded on valuable consideration, but occasionally it is a gift. It is important to distinguish between transactions based on valuable consideration and gifts, since the nature of the transaction determines the requisites for reformation. Where the plaintiff seeks reformation of a writing intended to express a transaction based on valuable con-

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[1] Sankey *v.* First Nat. Bank, 78 Pa. 48.

[2] Dubois Borough *v.* Dubois, etc. Co., 176 Pa. 430.

[3] Sample *v.* Bridgforth, 72 Miss. 293.

[4] Dortic *v.* Dugas, 58 Ga. 484; Crowder *v.* Langdon, 3 Iredell Eq. (N. C.) 476; Stettheimer *v.* Killip, 75 N. Y. 283; Brown *v.* Fagan, 71 Mo. 563; Pearce *v.* Suggs & Pettit, 85 Tenn. 724. (In the two latter cases the court also invoked the doctrine that equity does not relieve a party from the consequences of his own negligence.) Klauber *v.* Wright, 52 Wis. 303. But it seems that, if an inventory be made, and the parties contract upon the understanding that the inventory is correct, an error in the inventory is an intrinsic mistake which is ground for relief. See De Voin *v.* De Voin, 76 Wis. 66; Meinecke *v.* Sweet, 106 Wis. 21. But *cf.* Kaiser *v.* Nummerdor, 120 Wis. 234 (Negligence in detecting error).

sideration, he must establish three things with the requisite clearness.[1] First, he must show that the minds of the parties met upon a valid agreement which preceded the making of the writing, and which that writing is intended to express.[2] Second, he must prove the tenor of that prior agreement.[2] Third, he must show that by mutual mistake, or its legal equivalent, the writing fails to set forth the prior agreement correctly.[3] It is not enough to show a mistake by one party only.[4] In such a case, the parties are of equal merit. Neither version of the bargain is entitled to more weight than the other. The purpose of reformation is to prevent an error in reducing the bargain to writing from imposing on the parties a bargain which they never made. To reform for an error by one party only, where the writing correctly expresses the understanding of the other party, would work the very injustice which reformation is intended to prevent. It would impose on one party a bargain to which he never agreed. Yet a mutual error standing alone is not enough to justify reformation; the error must occur in reducing the prior bargain to writing and cause that writing to express the prior bargain incorrectly. The writing should not be reformed simply because it differs from the prior bargain, no matter how clearly this difference is proved. It may be that the parties have consciously modified the original bargain in reducing it to writing. Thus, if a term of the prior bargain be deliberately omitted from the writing, neither may later have this term inserted by reformation.[5] The writing must stand as the parties have chosen to make it. If, then, the writing be intended to embody a transaction founded on valuable consideration, there should be no reformation unless the plaintiff establish with the requisite clearness that, by reason of a mutual mistake, or its equivalent, the writing fails to set forth correctly the bargain on which the parties previously agreed.

There is, however, one equivalent which may be substituted for mutual mistake. Common honesty forbids a man to obtain or per-

[1] The proof must exceed a preponderance of the evidence and be "clear and satisfactory." Parker *v.* Hull, 71 Wis. 368; Glocke *v.* Glocke, 113 Wis. 303; Howland *v.* Blake, 97 U. S. 624. The unaided testimony of the plaintiff is not enough. McClellan *v.* Sandford, 26 Wis. 595. See also 16 Cyc. 70.

[2] See *ante*, p. 610, notes 3 and 4. Also Moehlenpah *v.* Mayhew, 138 Wis. 561, 573; Grant Marble Co. *v.* Abbot, 124 N. W. 264 (Wis.). See 6 Pomeroy, Eq. Jur. § 675.

[3] Betts *v.* Gunn, 31 Ala. 219; Andrew *v.* Spurr, 8 Allen (Mass.) 412; Braun *v.* Wisconsin, etc. Co., 92 Wis. 245. See also Whittemore *v.* Farrington, 76 N. Y. 452.

[4] Kruse *v.* Koelzer, 124 Wis. 536. See 6 Pomeroy, Eq. Jur. § 676.

[5] See note 3, *supra*.

fect rights with knowledge that the other party is laboring under a mistake. Equity will not permit him to reap the fruits of his dish nest silence. It will not avail him to say that the error ceased to be mutual because he discovered the mistake which he failed to correct. Such conduct amounts to fraud. If, then, by reason of mistake on the one hand, and knowledge of the error on the other, the writing fails to express the prior bargain correctly, equity will reform just as readily as if there had been mutual mistake.[1] Of course the mistake and fraud must be the cause of the incorrectness of the writing. They must intervene between the bargain and the writing just as mutual mistake must intervene; otherwise reformation is not the proper remedy. If the error and the knowledge thereof precede the making of the bargain, and the writing correctly expresses the agreement as it was actually made, there can be no reformation. The fraud of the defendant does not empower equity to make a bargain for him.[2] Yet the defendant will not be permitted to retain the fruits of his fraudulent conduct. Instead of reforming the writing, equity will rescind the whole transaction,[3] although some cases have given the defendant the option either to consent to reformation or to submit to rescission.[4] On the other hand, mistake and fraud in reducing the prior bargain to writing would not be ground for rescission. The bargain remains valid in spite of the subsequent misconduct of the defendant. The bargain is still a proper standard to which to reform the writing. Consequently the valid bargain should be affirmed by giving reformation.

If, however, the writing be intended to set forth a gift, instead of a transaction based on valuable consideration, the requisites for reformation are different. A gift is in truth a one party transaction. It is true that the donee must assent to the gift; otherwise no title could pass. But he is a passive party. He is simply a willing vessel into which the donor pours his bounty. The parties never intended to contract. If, then, a prior bargain were here required as a condi-

[1] Essex *v.* Day, 52 Conn. 483; Roszell *v.* Roszell, 109 Ind. 354; Welles *v.* Yates, 44 N. Y. 525; James *v.* Cutler, 54 Wis. 172; Venable *v.* Burton, 129 Ga. 537.

[2] Gun *v.* McCarthy, L. R. Ir. 13 Ch. D. 304. See also Grant Marble Co. *v.* Abbot, 124 N. W. 264 (Wis.).

[3] McCormick *v.* Miller, 102 Ill. 208; Clark *v.* Clark, 55 N. J. Eq. 814; Haviland *v.* Willets, 141 N. Y. 35; Harran *v.* Foley, 62 Wis. 584; Scott *v.* Coulson, (1903), 2 Ch. 249; Paget *v.* Marshall, L. R. 28 Ch. D. 255.

[4] Gun *v.* McCarthy, L. R. Ir. 13 Ch. D. 304; Paget *v.* Marshall, L. R. 28 Ch. D. 255; Harris *v.* Pepperell, L. R. 5 Eq. 1; Stone *v.* Moody, 47 Wash. 158.

tion of reformation, reformation could never be given. Yet the reasons for reformation still exist. The writing may not correctly express the terms of the gift. The writing is intended to express the intention of the donor at the time the gift was made. This intention is the model to which the writing should be remoulded, provided that, through mistake, the writing gives more than the donor intended to give. It follows, also, that the error need not be mutual. The donor is the active and ruling party. The donee gives nothing for what he gets. All is clear gain to him. Since he has no voice either in determining the extent of the gift or the terms in which that gift shall be expressed, mutuality of mistake is no essential ingredient of the equities of the case. Reformation, in such a case, imposes no burden upon the donee. It simply decreases the benefit which he would otherwise derive from the donor's generosity. If, then, the donor shows with sufficient clearness that the writing failed to express his real intention at the time he made the gift, he should have reformation,[1] provided, of course, that the situation, at the time he seeks relief, raises no countervailing equity in favor of the donee. It follows, also, that the donor is the only party who can reform. If, through a mistake, the writing fails to include all that the donor intended to give, no equity is thereby raised in favor of the donee, as against the donor. A generous intention on the part of the donor, coupled with an error in reducing that intention to writing, does not create a contract which the donee may specifically enforce. The donee is a volunteer who must take things as he finds them.[2] It is true that there are cases which permit the donee to reform the writing after the death of the donor as against the donor's heirs.[3] But, if the donee had no equity against the donor in the donor's lifetime, it is hard to see how the death of the donor can raise one against those who take what the donor left. Moreover, such an equity seems to fly in the face of the Statute of Wills. The better reasoning seems to be with the cases which deny the donee relief against the heirs or next of kin on the ground that he

[1] Andrews *v.* Andrews, 12 Ind. 348; Lister *v.* Hodgson, L. R. 4 Eq. 30 (rescission given here); Day *v.* Day, 84 N. C. 408; Ferrell *v.* Ferrell, 44 S. E. 187 (W. Va.); Mitchell *v.* Mitchell, 40 Ga. 11; 6 Pomeroy, Eq. Jur. § 679, note 18.

[2] Shears *v.* Westover, 110 Mich. 505; Powell *v.* Morisey, 98 N. C. 426; Dennis *v.* Dennis, 4 Rich. Eq. (S. C.) 307; Hout *v.* Hout, 20 Oh. St. 119; Willey *v.* Hodge, 104 Wis. 81.

[3] M'Mechan *v.* Warburton, L. R. Ir. (1896), 1 Ch. D. 435; 6 Pom. Eq. Jur. § 679, note 17.

is a mere volunteer.[1] If, then, the transaction be a gift, the donor should have reformation, if he shows that the writing fails to express his intention at the time he made the gift, but the donee, as a volunteer, should be refused relief, either against the donor or his heirs.

Rescission, as has already been shown, strikes down the bargain itself. Unless the mistake reaches the bargain, it will not justify this species of relief. Moreover, the mistake must be intrinsic.[2] It must touch and concern some matter which is actually a condition of the agreement.[2] An extrinsic error is no ground for relief.[3] An extrinsic error touches some matter of inducement, or some reason for making the agreement. But equity does not relieve a man from his contract because his reasons for making it were bad. To give relief in such a case would work a manifest wrong to the other party. Contracts are made in order to substitute an agreed certainty for the uncertainty of events. Such certainty is what each party pays for. If the bargain be rescinded, each party is remitted to the very uncertainty against which he sought to insure by making the agreement. When A seeks rescission of his agreement upon the ground of mistake, he offers his failure to form a correct mental picture of the situation as a reason why the Chancellor should deprive B of a right for which B has paid a price, the price being the consideration upon which the agreement rests. Of course the error may not be the fault of A. He may have been entirely without negligence in making the mistake. But *he* is the party responsible for the mistake. B may have shared in the error, but he is not the legal cause of it. Where there is no fiduciary relation between the parties, B is under no duty to guard A from error.[4] A must stand on his own feet and accept the consequences of his own acts. If A could escape from his agreement because he was mistaken in his reasons for making it, stability of contract would be destroyed. No contract would be safe. Unless the parties have chosen, either expressly or by implication, to make

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[1] Powell *v.* Powell, 27 Ga. 36; Enos *v.* Stewart, 70 Pac. 1005 (Cal.); and cases cited in p. 620, note 2.

[2] See *ante*, p. 615, notes 2–5 inclusive. Allen *v.* Hammond, 11 Pet. (U. S.) 63. Note 1 also contains some other cases in point.

[3] See *ante*, p. 616, notes 1–5 *et seq.* Kowalke *v.* The Milwaukee, etc. Ry., 103 Wis. 472, contains a very good discussion of this point, *obiter*.

[4] Dambmann *v.* Schulting, 75 N. Y. 55, 61; Graham *v.* Meyer, 99 N. Y. 611; Burgess *v.* Chapin, 5 R. I. 225, 228; Laidlaw *v.* Organ, 2 Wheat. (U. S.) 178, 195; Cleaveland *v.* Richardson, 132 U. S. 318, 329.

the existence of some fact a condition of the agreement, a mutual mistake as to that fact is no ground for relief.

Of course what was said in the last paragraph applies only to cases of mistake. If there be fraud, a different rule applies. It is well settled that equity will relieve, where there is fraud, even where the fraud touches only matters of inducement. Indeed, it is not necessary that the fraud be the sole inducement to enter into the agreement.[1] Thus, where A is induced to contract by several material representations made by B, some true and some false, the fact that the false representations are not the sole inducement does not constitute a defense.[1] In the same way, if B, *at or before* the making of the agreement, knows that A is contracting under a mistake as to some matter of inducement, he cannot insist on the bargain.[2] It is true that, in this latter case, B does not affirmatively cause the mistake. So far, at least, his conduct is less dishonest than where B's own misrepresentations are the cause of A's misconception. For this reason, an action of deceit would probably not lie against him. But, when B stands by, knowing of the mistake, and permits A to contract, he is still guilty of unconscionable conduct. He grasps the contract rights with unclean hands. It is no longer open to him to urge that the error is only extrinsic. He is seeking to profit by his own wrong, and this the Chancellor will not permit. On the other hand, knowledge of the mistake must be actually or legally brought home to B in order to preclude him from insisting on the extrinsic character of the mistake as a defense. Thus negligence in discovering the facts cannot be substituted for knowledge of them. Even a surety, who makes no inquiry, cannot object that, if the creditor had used ordinary care in investigating the facts, the fatal fact would have been discovered.[3] It is the consciousness of the error at, or prior to, the making of the contract, which carries the case across the line from

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[1] Matthews *v.* Bliss, 22 Pick. (Mass.) 48; Safford *v.* Grout, 120 Mass. 20; Sioux Nat. Bank *v.* Norfolk, 56 Fed. 139; Tooker *v.* Alston, 159 Fed. 599; Edgington *v.* Fitzmaurice, 29 Ch. D. 459. And see also 20 Cyc. 41, notes 63 to 65.

[2] Gun *v.* McCarthy, L. R. Ir. 13 Ch. D. 304; Harran *v.* Foley, 62 Wis. 584; Scott *v.* Coulson, (1903), 2 Ch. 249; Haviland *v.* Willets, 141 N. Y. 35; Clark *v.* Clark, 55 N. J. Eq. 814; McCormick *v.* Miller, 102 Ill. 208.

[3] Tapley *v.* Martin, 116 Mass. 275; Bowne *v.* Mt. Holly Bank, 45 N. J. L. 360; Wayne *v.* Commercial Bank, 52 Pa. St. 343; Bennett *v.* Bldg. Assoc., 57 Tex. 72; Frelinghuysen *v.* Baldwin, 16 Fed. 452; see also Brillion Lumber Co. *v.* Barnard, 131 Wis. 284, 295.

mistake into the realm of fraud. So long, then, as B cannot be charged either actually or constructively with notice of the mistake, at or prior to the making of the bargain, there can be no relief unless the error be intrinsic and mutual.

As we have seen, there should be no rescission, unless the error be intrinsic. But this necessarily involves the requirement that the mistake be mutual — or else known to the other party at or prior to the making of the contract. An intrinsic mistake is a mistake "as to one of the things actually contracted about."[1] But there can be no contract without a meeting of minds. If, then, the minds of the parties meet upon the subject matter and terms of the bargain, an error by one party only must of necessity be extrinsic. Of course an error by one party only may prevent the making of the bargain, since it may prevent the required meeting of minds. The meeting of minds may be verbal, but not actual. Thus, in Raffles *v.* Wichelaus,[2] the minds of the parties met verbally on the agreement to buy and sell certain cotton "ex Peerless" from Bombay. There was no uncertainty as to the wording of the agreement. But there was no contract because there were two ships called the Peerless, each Peerless sailed from Bombay, and each party had in mind a different vessel. In such a case, there can be no *rescission*, since there is no bargain to rescind. Of course, where the equities require it, there may be *cancellation;* that is to say, a destruction of the writing. Doubtless this is the meaning of the statement so often found in the cases, that an error by one party only may be ground for rescission.[3] Usually this statement occurs *obiter*, and the court has not in mind the distinction between cancellation and rescission, that is to say, the distinction between destroying a bargain on which the parties actually agreed, and destroying a writing which appears to define a bargain which never in truth existed. At any rate, when the case has actually arisen, the courts have almost uniformly refused to rescind a bargain on which the parties had actually agreed, for an error by one party only,[4]

[1] Dodge, J., in Kowalke *v.* The Milwaukee, etc. Ry., 103 Wis. 472, 477. See also *ante*, p. 613 *et seq.*, where the nature of intrinsic error is fully discussed.

[2] 2 Hurl. & Colt. 906.

[3] See Moffett, etc. Co. *v.* Rochester, 178 U. S. 373; Bibber *v.* Carville, 101 Me. 59. I have found but one case where the minds of the parties met and relief was actually given for an error by one party only, — Board of School Commrs. *v.* Bender, 36 Ind. App. 164. It seems hard to reconcile this with Lucas *v.* Owens, 113 Ind. 521.

[4] Bibber *v.* Carville, 101 Me. 59 (but notice that the decision is put partly on the ground of plaintiff's negligence), and cases cited *ante*, p. 612, note 1.

where such error was unknown to the other party. Two of the cases, Steinmeyer *v.* Schroeppel[1] and Grant Marble Co. *v.* Abbot,[2] have been stated *supra* in the text. Moreover, these cases are in accord with the numerous authorities which hold that a surety who is induced to enter into the contract of suretyship by the fraud of the principal debtor has no defence against the creditor, unless the creditor had notice of the fraud at, or prior to, the making of the contract.[3] If even a surety, that favorite of the Chancellor, cannot avoid his contract where his error is due to the fraud of a third party, it seems clear that one who is responsible for his own mistake should have no relief. He must verify his reasons for contracting before he contracts. After the contract is made, it is too late for him to say that his reasons for making it were bad.

We have now considered mistake with reference to both reformation and rescission. It only remains to call attention to two general limitations on mistake as a ground for equitable relief. In the first place, the mistake must relate to some past or present fact.[4] The Chancellor does not give relief because the unexpected happened or the expected failed to occur. The same rule is applied in cases of fraud. A representation that something will take place in the future is no ground for relief, even though the representation fails to materialize. Future probabilities must always be a matter of uncertainty, although the uncertainty may be greater or less, according to circumstances. As to the future, then, each party must take his chance.

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[1] 226 Ill. 9. [2] 124 N. W. 264 (Wis.)

[3] Davis, etc. Co. *v.* Buckles, 89 Ill. 237; Lepper *v.* Nuttman, 35 Ind. 384; Jones *v.* Swift, 94 Ind. 516; Bank of Monroe *v.* Anderson, 65 Ia. 72 (*semble*); Martin *v.* Campbell, 120 Mass. 126; Radovsky *v.* Fall River Savings Bank, 196 Mass. 557; McWilliams *v.* Mason, 31 N. Y. 294; Casoni *v.* Jerome, 58 N. Y. 315; Page *v.* Krekey, 137 N. Y. 307 (*semble*); Howe, etc. Co. *v.* Farrington, 82 N. Y. 121; Kulp *v.* Brant, 162 Pa. St. 222; and see Fairbanks *v.* Snow, 145 Mass. 153 (duress); Brandt, Suretyship, §§ 456, 457. The same rule applies to ordinary contracts. Law *v.* Grant, 37 Wis. 548.

The question as to how far notice to an agent is notice to the principal is beyond the scope of this article. But in this connection Barker *v.* Pullman Palace Car Co., 124 Fed. 555, affirmed C. C. A. 134 Fed. 70, will be of interest. In that case it was held that, where two agents had power to negotiate only, but the principals reserved the power to conclude the agreement, an error mutual as to the agents was *not* mutual as to the principals, and hence such mutual error of the negotiating agents was not ground for reformation.

[4] Parke *v.* Boston, 175 Mass. 464; Southwick *v.* Memphis, etc. Bank, 84 N. Y. 420; Kowalke *v.* The Milwaukee, etc. Co., 103 Wis. 472, 477 (*semble*). See also 20 Am. & Eng. Encyc. 813. *Cf.* Miles *v.* Stevens, 3 Pa. St. 21.

Broadly speaking, also, the Chancellor only helps those who help themselves. Courts of equity do not sit for the purpose of relieving the negligent from the consequences of their own carelessness. As we have already seen, the mistake is the work of the very party who pleads it as a reason for relief. It is going a good way to relieve a party from his contract, because of something which he himself has done. Certainly it seems reasonable for the Chancellor to refuse his aid to one who might have protected himself by using ordinary care at the time of making the agreement. If at law A may be made to respond in damages to one whose injury is the proximate consequence of A's negligence, it seems inconsistent for equity to give A relief because his negligence has recoiled on his own head. At law, also, contributory negligence is a bar to relief.

In this instance equity has followed the law,[1] though with some qualifications and hesitations.[2] Further discussion of these qualifications is outside the scope of this article. Here it is enough to say that relief is frequently, but not invariably denied to a party whose error is a consequence of his own want of reasonable care.

In summary, then, we have the following propositions:

1. To be a ground for relief the mistake must relate to a present existing fact and must not be due to a want of ordinary care on the part of the plaintiff.

2. If the plaintiff seek reformation of a writing intended to set forth a transaction based on valuable consideration, the plaintiff must establish a prior bargain upon which the parties agreed, and that by mutual mistake, or mistake on the part of the plaintiff, and knowledge thereof on the part of the defendant, that writing fails to express the prior bargain.

3. If the plaintiff seek reformation of a writing intended to set forth a gift, he must show that by mistake in reducing the terms of the gift to writing, the writing fails to express the donor's intention; but in such a case the donor is the only party who may obtain this relief, since equity will not interfere to increase the gift in favor of the donee who is a mere volunteer.

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[1] Placer County Bank *v.* Freeman, 126 Cal. 90; Bibber *v.* Carville, 101 Me. 59; Glenn *v.* Statler, 42 Ia. 107; Brown *v.* Fagan, 71 Mo. 563; Johnston *v.* Patterson, 114 Pa. St. 398; Pearce *v.* Suggs & Pettit, 85 Tenn. 724; Anderson *v.* Warne, 71 Ill. 20; Bostwick *v.* Mutual Life Ins. Co., 116 Wis. 392; Kaiser *v.* Nummerdor, 120 Wis. 234; Grant Marble Co. *v.* Abbot, 124 N. W. 264 (Wis.); Grymes *v.* Sanders, 93 U. S. 55; Shappirio *v.* Goldberg, 192 U. S. 232, 241; 2 Story, Eq., 13 ed., p. 225; 16 Cyc. 69.

[2] 6 Pomeroy, Eq. Jur. § 680, note 19; 2 Pom. Eq. Jur. § 856.

4. If the plaintiff seek rescission, he must show that the parties entered into the agreement under a mutual mistake as to some matter actually contracted about; or else that the defendant became cognizant of the plaintiff's mistake at, or prior to, the making of the agreement.

It may be noted, then, that the general rule is that, whether the relief sought be rescission or reformation, the plaintiff must show either a mutual mistake, or else a mistake on his own part, coupled with knowledge thereof on the part of the defendant. The exception to this rule is the case where equity reforms a writing at the suit of a donor as against a donee who is a mere volunteer.

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